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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. SEBREN ABBALUM PIERCE, Defendant and Appellant.	E046294 (Super.Ct.No. FSB18868) OPINION

APPEAL from the Superior Court of San Bernardino County. Bryan Foster, Judge. Affirmed in part, reversed in part with directions.

Patricia L. Brisbois, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Pamela Ratner Sobeck and James H. Flaherty III, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant, Sebren Pierce, of nine counts of committing lewd and lascivious acts on a minor (Pen. Code, § 288, subd. (a))[1], during seven of which he engaged in substantial sexual conduct with the victim (§ 1203.066, subd. (a)(8)). The jury further found that defendant had committed sexual penetration of a minor against more than one victim (§ 1203.066, subd. (a)(7)). In bifurcated proceedings, the trial court found that defendant had been convicted of two prior rapes (§ 667.61, subds. (a) & (d)) and a prior rape (§ 667.71) in connection with nine of the convictions.[2] Also in bifurcated proceedings, the trial court found that defendant had committed eight strike priors (§ 667, subds. (b)-(i)) and eight serious felony priors (§ 667, subd. (a)(1)). He was sentenced to 50 years plus ten 75-years-to-life terms and appeals, claiming his *Marsden*[3] motion and his motion for a continuance were erroneously denied and he was improperly sentenced. We reject his first two contentions and agree with the third. Therefore, we remand the matter for resentencing as to some of the counts, with directions to amend a minute order that is incorrect, and otherwise affirm. Defendant also submitted a Petition for Writ of Habeas Corpus (Case No. E049371, filed October 5, 2009), which we ordered considered with this appeal. We will resolve that petition by separate order.

FACTS

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] As to count 10, only one finding was made, and it was under section 667.71.

[3] *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

Between November 1, 1992 and April 30, 1998, defendant engaged in various sex acts with his stepdaughter, while she was between the ages of 5 and 10, and with the stepdaughter's friend, who was 10, and with the friend's sister, who was 8 (hereinafter, "the sisters"), both of whom spent the night at defendant's home.

ISSUES AND DISCUSSION

The Appeal

1. *Denial of Defendant's December 7, 2007 Marsden Motion*

Defendant was arraigned on the complaint[4] in the case on April 5, 2000. Between then and December 7, 2007, he made *six Marsden* motions—two were granted and four, including the one here at issue, were denied. Also during that period, defendant represented himself for an almost nine month period before requesting appointment of counsel, objected to the appointment of a conflict's panel attorney, had another *Faretta*[5] motion denied, unsuccessfully moved three times to have a particular attorney appointed to represent him and unsuccessfully sought cocounsel status, which was later granted for a limited purpose.[6]

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[4] The complaint was filed in January 1998, but defendant was not arrested until September 2000, after he was released from prison for offenses he committed in Northern California.

[5] *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*).

[6] He also made another *Faretta* motion near the end of trial after the trial court denied his motion for a mistrial. His motion was granted. Defendant then unsuccessfully moved to have his now former attorney appointed as cocounsel. Defendant examined one witness, then rested his case and argued to the jury.

His initial representation by the Public Defender's Office ceased when a conflict of interest was declared and a conflict's panel attorney was appointed. This representation was interrupted by defendant's almost nine month representation of himself. Three days after a conflict's panel attorney was once again appointed to represent defendant, he objected to the appointment. Thereafter, he tried three times, unsuccessfully, to have a particular attorney appointed instead. However, thereafter, the conflict's panel attorney was relieved and the one defendant wanted was appointed. Defendant followed this with an unsuccessful motion for cocounsel status and a *Marsden* motion, which was granted when the attorney defendant requested to represent him declared an irretrievable breakdown in their relationship. The attorney appointed to replace him was himself replaced when he declared a conflict of interest. Defendant successfully brought a *Marsden* motion against the next attorney who was appointed to represent him. The next attorney appointed to represent defendant declined the appointment and another was put in his stead. That attorney declared a conflict and was relieved. So did the next attorney appointed, but he was not relieved until he requested relief due to medical problems. The last attorney to be appointed before defendant's December 7, 2007 *Marsden* motion was then appointed, after which defendant successfully obtained cocounsel status for a limited purpose[7] then brought two *Marsden* motions, the second of which is now before us. At that point, *more than 8 years and 7*

[7] That purpose was solely so defendant could have law library privileges.

months had passed between defendant's arraignment on the complaint and the now contested Marsden motion.

Defendant begins his attack on the trial court's denial of his December 7, 2007 *Marsden* motion by calling our attention to the denial of his September 7, 2007 *Marsden* motion, brought against the same attorney (defendant described him as the 11th attorney who represented him in this case), who had been appointed to represent him the previous December. At the hearing on the September 2007 *Marsden* motion, defendant alleged, inter alia, that the defense investigator for his prior attorney authored a report stating that the prosecution's medical expert[8] "has changed her opinion concerning the medical evidence" after being provided with discovery materials by the defense. In a written letter to the court predating the hearing, defendant had asserted that the medical expert had told this defense investigator over the phone that the "prosecution's medical evidence no longer supports the allegations against [defendant]" and that she had not been given all the information about the duration and extent of the allegations before her 1998 exam of defendant's stepdaughter. Defendant criticized his current attorney for not getting this investigator's report or a report from the medical expert. Defense counsel said he did not think that his investigator had yet spoken to the investigator for the prior attorney. He pointed out that the prior investigator was no longer in the business, and he did not know where he was, but he felt he could be located. Defense counsel told the court that defendant had told him that the medical expert had "changed her opinion basically 180

[8] She had not testified at the preliminary hearing. At trial, she testified that she had examined defendant's stepdaughter.

degrees." Defense counsel said he was "seeking evidence of a prior inconsistent statement" by the medical expert. In denying defendant's *Marsden* motion, the trial court said, "As far as the prior inconsistent statement of [the medical expert] is concerned, I don't know what [defense counsel] can do about that. There may be an issue that is brought up at the time of trial to exclude witness testimony or something of that nature, but it is not something that would . . . be involved in the removal of . . . counsel . . . . [¶] . . . [¶] . . . [T]hat issue or the failure to raise that, at this time[,] it doesn't show a defect in [counsel's] representation because of the fact that it can be brought up at the time of trial."

Also at the hearing on the September 7, 2007 *Marsden* motion, defendant asserted that his attorney had not interviewed prosecution and defense witnesses and had done no investigation. Defense counsel responded that his investigator had talked to defendant and "some of the issues I believe were discussed . . . that [defendant] is talking about now." He added that his investigator had received the file from either the court or previous counsel and "we're still in the process because of the size of that file of going through [it] to ascertain whether we have everything or not." He said he had spoken to the prosecutor about discussing the case with her to make sure he had everything he needed. He added, "I'm having to get up to speed." He said he had discussed (but did not say with whom) a 995 motion and other motions, but had not yet filed any. He said that he had made some notes and did some investigation. He said he was still in the process of getting a copy of the transcript of the preliminary hearing, which was not in the file he received. He noted, "I have a file that has been through . . . 11 other attorneys'

hands and it's grown apparently with each representation. . . . I just can't speak to the completeness of what I have." Counsel said that defendant also wanted him to bring a motion of actual prejudice against the court. He said that he had received a number of correspondences from defendant, which he discussed with defendant when they were in court together. In denying defendant's *Marsden* motion in regard to these matters, the trial court concluded that "some things have not been totally completed as yet, but it doesn't appear to me that [defense counsel] has neglected his duty in terms of representation. [¶] There [are] some issues that I'm sure that [counsel] needs to address. We can address those in terms of either continuance of the trial or trailing status of the trial sufficient to perform the things that you're talking about; the preliminary hearing transcript and 995 motion, that type of thing. [¶] . . . [¶] As far as motions against the Court, that's for you to decide. As far as the witness interviews are concerned . . . the failure of the prosecution to make those witnesses available, . . . that's an issue that comes up at the time of trial for purposes of excluding the testimony of those witnesses or dealing with those. And I don't have enough information at this time to make a ruling on that. [¶] But that's something that would be a trial issue at pretrial. As far as bringing to the attention of the Court any matters under . . . 995, that goes . . . to . . . reviewing the transcript [of the preliminary hearing] and dealing with that. I'll give you time to file that if necessary."

During his December 7, 2007 *Marsden* motion, defendant asserted that his attorney failed to interview his stepmother,[9] his daughter, himself and his stepdaughter's mother. He reasserted that the prosecution's medical expert "changed her opinion from prosecutorial to defense in nature after she viewed the discovery in this case." He said his attorney failed to move to strike evidence based on prosecutorial misconduct and unconstitutional police action, which he claimed was proven by the preliminary hearing transcript. He criticized his attorney for failing to obtain a transcript of the prosecutor saying she did not care about the evidence in the case and she was going to ignore it because she knew defendant was guilty. He asserted that his attorney failed to object to inadmissible evidence. He claimed that all his communications with his attorney took place in the presence of "deputy district attorneys and would-be inmate informants." He said his attorney failed to investigate the contents of a lengthy letter defendant had sent to the United States Supreme Court in which defendant listed grievances he had, none of which involved defense counsel. In his written motion, but not at the hearing on the motion, he also accused his attorney of associating with one of his prior attorneys, whom he claimed engaged in criminal activities, and of failing to apprise him of threats his prior attorney had made against defendant and defendant's daughter.

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[9] There is some confusion as to whether defendant was referring to his mother or his stepmother, although he said during the hearing that it was the latter. However, as the People correctly point out, during his September 7, 2007 *Marsden* motion, he said it was his mother and that she had died in 2006. The target of defendant's last two *Marsden* motions did not begin representing him until December 18, 2006.

Defense counsel responded at the hearing that he and defendant had discussed "a number, if not all" of the issues defendant presented "on a number of occasions." He said the defense had been unable until recently to speak to a key witness and the three victims had been unwilling to talk to him. He said he had not been able to locate or replicate items, such as logs, which defendant asserted would exonerate him. He said all his discussions with defendant had been in the courtroom. The court denied the motion, saying, "[I]t appears to me that [defense counsel has] taken the steps he could take. There appears to be some evidence that may be lacking in your case; however, that is a function of factors that I believe are beyond his control." Before the hearing on defendant's December 7, 2007 *Marsden* motion took place, defense counsel had stated that he was not ready for trial because he had not finished his investigation. His request for a continuance was denied and the case was assigned to a department for trial. However, it did not go to trial until April 9, 2008. At trial, defendant was represented by the same attorney who was the subject of these two *Marsden* motions.

Defendant here contends that we should remand the matter for a new *Marsden* hearing because the trial court failed to make a sufficient inquiry into the specific areas counsel had not yet finished investigating. However, in addition to defendant's lengthy remarks at the hearing on the motion, he submitted to the trial court a 17-page, small-print written motion in which he addressed, at length, every complaint he had against defense counsel. Also, defendant had submitted to the trial court a six-page letter, in even smaller print, as a companion to his September 7, 2007 *Marsden* motion. This letter addresses many of defendant's complaints against his attorney. Defendant was

permitted, during the hearings on both motions, to speak freely and at length. Therefore, the record does not support defendant's assertion that the trial court was not aware of the grounds for his motion. The court did not need to make inquiry beyond the lengthy explications provided by defendant.

Defendant also asserts that the trial court abused its discretion in denying his December 7, 2007 *Marsden* motion because counsel said he had not completed his investigation and was not yet ready to go to trial. However, trial was not scheduled to begin until three days later, and, in fact, did not begin until more than four months later. This was not a complicated case factually and only nine witnesses testified, including the three victims. Defendant asserts that his attorney's lack of preparation deprived him of effective representation in two regards, which he must demonstrate in order to show prejudice from the trial court's asserted abuse of discretion in denying his *Marsden* motion. (*People v. Valdez* (2004) 32 Cal.4th 73, 95.)

First, he points out that during trial, it was discovered that a file containing the pictures the prosecution's medical expert took of defendant's stepdaughter's vagina during her examination of the child[10] and the report she received about the alleged abuse before her examination was missing, even after extensive and long-term efforts by the doctor to locate it. Contrary to defendant's assertion, the doctor's report, containing the questions she asked the victim before she examined her, the answers the victim supplied,

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10 The doctor testified that these photographs were not as good as seeing the hymen "in person" and that even the best photos give only "a passable representation of what you're actually . . . looking at[.]"

what the doctor discovered during the exam and her conclusions based on her findings were in the doctor's hands while she testified, copies of which, defendant concedes, were given to the defense by the prosecutor. The doctor testified that the missing file, which is not a medical file, but a county file, typically contains a report from the reporting agency, e.g., Child Protective Services (CPS) or law enforcement, which includes how they got involved, a description of the parents of the victim, any past CPS record, a copy of a summary of the forensic interview, if there was one, any lab results and a copy of the doctor's report, such as the one she had while testifying. She acknowledged having been given a copy of a letter from a former defense investigator (not to her) the day before she testified, but her viewing of the letter did not spark any recall of her contact with the former investigator. She acknowledged that in the letter the former defense investigator stated that based on the information he had supplied to the expert years before trial, she voiced an opinion different than the one she later gave at trial, *under cross examination by defense counsel*, which was that defendant's stepdaughter had an abnormality in her hymen which the doctor attributed to sexual abuse as the most plausible explanation.

Defendant here acknowledges that both trial counsel and the prosecutor were unaware that the file was missing until that day or the day before. Defendant concedes that "counsel did not know precisely what information was contained in the missing file . . . or whether it contained potentially exculpatory evidence that could have been examined by a defense expert." Defendant here attributes trial counsel's asserted failure to investigate, as alleged in his *Marsden* motion, as the reason for the missing file. This is pure speculation. Moreover, if the failure to investigate is responsible for the missing

file, then the prosecutor was just as negligent as defense counsel because, according to defendant, she was also unaware that the file was missing. Additionally, since, according to defendant, himself, no one knows what's in the file and whether it contains exculpatory evidence, defense counsel's failure to find it or to discover that it was missing cannot be deemed to be prejudicial. As the doctor herself testified about the history she received from someone other than defendant's stepdaughter, "it doesn't matter because what's in the [physical] exam is in the exam." Of more importance to the defense, it would seem, is the contact between the doctor and the former defense investigator, which had nothing to do with the missing file.

Second, defendant points out that his stepdaughter's cousin, whose name appeared on his list of witnesses, was not called by him at trial. The stepdaughter testified that defendant molested her at her grandmother's house once in the same room in which two of her cousins were sleeping, although she was unsure which of her cousins were present. She also testified that one time at her grandmother's house, he molested both her and the cousin, who was on the defense witness list, in the bedroom of the latter. She testified that she tried to speak to this cousin about it the following day, but the latter acted like nothing had happened. She also said that defendant had sex with this cousin once at the stepdaughter's home. However, when she confronted her the next day about it, the latter again denied that it had happened. Defendant's stepdaughter testified that the cousin denied that defendant had molested the cousin. The cousin never testified, and defendant points to no evidence that the cousin denied that defendant had molested the stepdaughter. Therefore, defendant fails to persuade us that the failure to call the cousin

as a witness, whatever the reason was, harmed the defense. Moreover, because there may have been sound reasons for not calling her, we cannot fault trial counsel for doing so.

2. *Denial of Defendant's Motion to Continue*

The name of the aforementioned former defense investigator was included in the defense's witness list.[11] As stated before, the prosecution's medical expert testified that while she might have met with the former defense investigator three years before, she did not recall talking to him. During cross-examination of the doctor, defense counsel solicited her testimony that the former defense investigator had written someone a letter in which he asserted that he had provided the doctor with additional information, and based upon it, the doctor, at that time, gave an opinion that was different than the one she ultimately offered at trial about the cause of cleft in the victim's vagina. The doctor then reasserted that she did not recall talking to the former defense investigator.

The People rested their case-in-chief on April 17, 2008. The jury was let go early that day and told not to return until four days later. After the jury had been dismissed, defense counsel said he would continue to "check on the status" of the former defense investigator and when he "bec[a]me aware of his medical condition" he would inform the prosecutor and the trial court. Defense counsel said if the former investigator was available, he would be the defense's first witness, four days hence.

On the morning of April 21, the trial court postponed trial until the afternoon of the following day, telling the jury that because a witness "that may or may not be called

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[11] This list was filed five months before trial began.

[to testify] . . . [¶] . . . [¶] . . . depending on what this witness is going to say" had been involved in a traffic accident and had been hospitalized. As it turned out, this witness was the former defense investigator. The trial court told the jury that there were only one or two witnesses remaining before the case ended. Outside the presence of the jury, defense counsel told the court that he was in contact with the family of the former defense investigator and was awaiting the results of the latter's appointment with his doctor to determine if he could come to trial and testify or be examined at his home.

The afternoon of April 22, the trial court told the jury that the matter of the witness's testimony had still not been resolved; that trial was going to be continued until the morning of the next day and if, by that point, arrangements had not been made to examine the witness away from the courthouse, trial would continue without the witness. The trial court promised the jury that it would get the case the following day, even if this witness could testify. Outside the presence of the jury, the trial court noted that defense counsel had been unable to determine the status of the former defense investigator because counsel's calls to the cell phone of the investigator and/or his wife had not been returned. Defense counsel said the issue was whether the former defense investigator was competent to testify, given the medication he was on at the time. The trial court told both counsel to be ready to argue to the jury the following day.

The next morning, April 23, defense counsel reported that the wife of the former defense investigator had told him that her husband's doctor did not want the witness transported anywhere. The witness's wife reported to defense counsel that her husband was on morphine, Motrin and "several other heavy-duty medications" that made him not

alert and unresponsive even when he was awake. Defense counsel asked for a continuance to allow the former defense investigator to convalesce sufficiently that he could come to court and testify. Defense counsel's offer of proof as to the anticipated testimony of this witness was that he had contacted the prosecution's medical expert "four to six years ago" and he provided the doctor with additional information, including some related to defendant's stepdaughter's "alleged sexual history." Two months later, the doctor contacted the investigator and told him that "the basic physical findings of her examination of [the stepdaughter] would stay the same because she did in fact notice and record an abnormality to [the stepdaughter's] hymen; however, . . . based on the new information and greater frequency of unreported sexual contact or any other type of sexual contact, that her ultimate opinion would change as to whether in fact it was abuse . . . ." The trial court responded that the doctor had not opined that the cleft in the stepdaughter's hymen had been definitely caused by abuse—that abuse would be the most frequent cause of such things, but an accident or something else of which she was unaware could have caused it. Defense counsel pointed out that the doctor had opined that the physical findings were highly suggestive of abuse. The prosecutor said that defense counsel would not be able to introduce evidence about sexual activity by the stepdaughter under Evidence Code section 782,[12] and when the doctor had testified she had said that her opinion might change based on the number of acts of penetration and

[12] Evidence Code section 782 governs the admission of evidence of the sexual conduct of the complaining witness and no measures had been undertaken by defense counsel, up to this point, to admit such evidence.

other variables. The trial court denied the motion for a continuance. It observed that it was the defense who solicited the doctor's testimony that the abnormality in the stepdaughter's hymen highly suggested sexual abuse and it appeared that the defense was attempting to attack evidence it solicited. The court added that under Evidence Code section 352, the evidence required an undue consumption of time and it was not sure it would rule any differently even if the former defense investigator were available to testify. The court noted its agreement with the prosecutor that the proffered evidence "deals specifically with other sexual activity" and it did not directly refute the doctor's testimony. The trial court pointed out that the testimony showed that the stepdaughter had not been forcibly penetrated, but had submitted under threats and the doctor had testified that the same abnormality to the stepdaughter's hymen could have resulted from nonforceful penetration. The trial court found no inconsistency between the offer of proof and the doctor's testimony.

The doctor had testified on direct that defendant's stepdaughter told her that there had been vaginal penile and vaginal digital/hand contact and anal penile and anal digital contact and that a lubricant had been used, all more than 6 months before she examined the child. She said the stepdaughter's hymen had an abnormality, i.e., that a portion of it was decreased. When asked if a girl had reported that she had been penetrated by a penis between the ages of 5 and 10, would the doctor expect to find a partial hymen, she said that five year olds who are forcibly penetrated always have damage, but if the penetration was done carefully and/or with lubricant, this may not be the case. She said that damage to the hymen of a five year old would depend on whether lotion was used, the size of

whatever was inserted into the vagina, whether force was used, whether the victim was relaxed and the number of times and degree of penetration that occurred. Getting back to the question, the doctor said, "It's just a manner in which it's being done, so that's why it's not a very simple question to answer, the one you posed to me, like if you had intercourse so many times you have damage. It depends." She added that the passage of time between the last penetration and her examination could affect what she saw. On cross-examination, she repeated that the stepdaughter's hymen was absent in a particular area, "so [the hymen has] been damaged." She conceded that, without the history she had been given about the cause of the abnormality, she could not say with medical certainty that it had not been genetic, although she felt this was very unlikely. She also said that, without the history, the condition of the hymen was consistent with penetration, but it could not be determined how frequently the penetration occurred and what instrument was used to do it. She said she would not expect that the hymen of a five year old whose vagina had been penetrated by an adult penis would have to have been more damaged than the stepdaughter's was. When asked, "[I]f . . . [a victim] was telling you that [she] had been fully penetrated hundreds of times over a five-year period . . . , would you expect to see th[e] level of abnormality [the stepdaughter had] or would you expect to see a greater level of abnormality or trauma?" the doctor stated, "[Y]ou don't have to see any trauma if [the victim] is a pubertal

person."[13, 14] Defense counsel asked the doctor whether trauma to the hymen "doesn't necessarily or automatically mean it was caused sexually[.]" She responded, "[H]ymenal trauma is almost always due to penetration. Most penetrations are sexual but . . . sometimes there are accidents." Defense counsel then asked the doctor whether, if there had been hundreds of episodes of adult penile penetration of a five to ten year old, would other trauma be expected. She responded, "The best way I can answer this is by saying that almost all our exams are normal . . . ." She said that use of a lubricant and the speed and force of the penetration would affect the presence and degree of a hymenal abnormality and she would expect to see more injury than she saw in the stepdaughter if a lubricant had not been used, if greater force had been used and/or if greater speed had occurred. She said if a five year old had been repeatedly penetrated by an adult penis every other day for a year, upon examining that child at the age of six, she would expect to see more trauma than she did to the stepdaughter's hymen. As a follow-up question, she was asked, "[W]ith the passage of time would you still expect to see some evidence of that level or frequency of sexual intercourse?" She responded, "I would expect to see trauma and actually we do see trauma. . . . [W]e have lots of exams where there's penetration where there's no trauma at all, but to see what I believe is trauma it's pretty significant, and . . . it is a significant finding that the [stepdaughter's] hymen is almost

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[13] She later testified that the stepdaughter was pubertal when she examined her.

[14] Thus, defendant's assertion that the stepdaughter's claims of almost daily sexual penetration would not be supported by the medical evidence and that such evidence would have impeached her credibility is unfounded.

gone [at a particular point]." She opined that if a 10 year old had sexual relations with a 14-year-old male, she would expect to see the kind of abnormality defendant's stepdaughter had. In response to questions *by defense counsel*, she stated that she concluded on her report that there were abnormal or unusual findings and abuse was highly suggested.

Defense counsel admitted that he had not spoken to the former defense investigator and did not know whether what he had to say was cumulative or new information. Nevertheless, defense counsel made an unsuccessful motion for mistrial because he asserted the absence of this witness prevented him from presenting an effective defense.

Defendant contends the trial court abused its discretion in denying his motion for a continuance because there was no evidence that the former defense investigator was indefinitely available. That is not the point—defense counsel was, at the sunset of trial,[15] requesting an *open-ended* continuance, for testimony the impact of which was completely unknown. The doctor's testimony was not so devastating to the defense that a refutation (if it could be made) of her conclusion that abuse was highly suggested would have made a substantial impact in this trial. This trial really hinged on the testimony and believability of the victims. Moreover, contrary to defendant's current suggestion, nothing in the record indicates that a one-or two-week continuance would have been sufficient to permit the former defense investigator to testify. Certainly, such a

[15] The evidentiary portion of the trial lasted only another hour.

representation had not been made by defense counsel to the trial court. Defendant cannot possibly show that the testimony of the former defense investigator was crucial. The only thing the former defense investigator could have testified to was that, pretrial, the doctor gave an opinion which was different than the one she gave at trial *when confronted with other facts*, which is exactly what the doctor did while on the stand. Moreover, those facts, according the defense counsel's offer of proof, related to the stepdaughter's "alleged sexual history." The prosecutor correctly noted that defendant could not explore that area without observing the requirements of Evidence Code section 782, which he had not done. To the extent that defendant now asserts that the "new information" was that he and his stepdaughter had sex numerous times and the damage to her hymen was inconsistent with that information, he did not so state below in his offer of proof and therefore cannot now argue it as a basis for his claim that the trial court abused its discretion. Moreover, the doctor addressed that in her testimony. The crimes had been committed between 1992 and 1998. Trial took place in April 2008, thanks, in large part, to defendant's own actions in delaying matters, as outlined above. The trial court did not abuse its discretion in refusing to make the jury and the parties wait an indefinite amount of time for testimony that probably would not have been helpful at all to defendant.

3. S*ection 667.61, subdivisions (a), (c) & (d)*

Pursuant to section 667.61, subdivisions (a), (c) and (d), defendant was sentenced to 25-years-to-life terms for each of his 10 convictions. The parties agree that in order for section 667.61 to apply, the offenses must have been committed on or after November

30, 1994, the effective date of the section. Defendant concedes that the evidence supports findings that the crimes committed against the sisters occurred after section 667.61 became effective. However, he asserts the same is not true of those involving his stepdaughter, except for the sexual penetration conviction. Therefore, he asserts that imposition of the 25-years-to-life terms for the convictions involving her violates the prohibition on ex post facto laws.

The information alleged that the acts involving the stepdaughter occurred between November 1, 1992 and April 30, 1998. The jury was not called upon and did not provide a date for each of the eight crimes involving her. The jury was instructed as to all these acts except the charged sexual penetration (count 7) that it must either agree on which act defendant committed for each count or it must agree that the People have proved that defendant committed all the acts alleged to have occurred during the period and that defendant committed at least seven[16], one for each such charge involving her. The

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[16] The only act of sexual penetration the stepdaughter described occurred after she missed five words on a spelling test while she was in fourth grade, which, based on the facts that she was born in November 1987, had to have occurred after November 30, 1994. Defendant asserts that in 2006 that the subdivision of section 289 under which defendant was charged, i.e., (j) was added to the list of offenses covered by the 25-years-to-life term provided for by section 667.61. He is incorrect. In 2006, section 289, subdivision (j) was added to the list of *prior* offenses for which section 667.5, subdivision (a) provides a three-year enhancement upon conviction of a current offense. (Added by Stats. 2006, ch. 337 (S.B. 1128), § 30.) Section 289, subdivision (j) was not, at the time defendant committed this offense, and is still not, part of the list of crimes covered by section 667.61, therefore, the 25-years-to-life term for it should not have been imposed.

In his reply brief, defendant asserts that this conviction could also be based on defendant's insertion of his penis into the victim's anus. However, the victim testified to three or four acts of anal sex. On the other hand, the prosecutor argued to the jury that "the seventh molestation involves a spelling test. [The stepdaughter] said that she had

[footnote continued on next page]

stepdaughter testified that sex acts occurred between her and defendant almost every night or every other night during the November 1992-April 1998 period. She also testified that three such acts occurred on or after November 30, 1994.[17] The People contend that this evidence supports the imposition of three of the 25-years-to-life terms.

The problem with this is, which three of the seven? In *People v. Hiscox* (2006) 136 Cal.App.4th 253, the appellate court held, "[I]t is the prosecutor's responsibility to prove to the jury that the charged offenses occurred on or after the effective date of the statute providing for the defendant's punishment. When evidence at trial does not establish that fact, the defendant is entitled to be sentenced under the formerly applicable statutes . . . . [¶] . . . [¶] [Because the jury instruction allowed the jury to convict the defendant by] agreeing that [he] committed all the acts described by the victims[,] . . . the jury could have returned guilty verdicts without considering when any particular offense occurred. [¶] Since the jury was not asked to make findings on the time frame within which the offenses were committed, the verdicts cannot be deemed sufficient to establish the date of the offenses unless the evidence leaves no reasonable doubt that the underlying charges pertained to events occurring on or after November 30, 1994. [Citation.] It would be inappropriate for us to review the record and select among acts

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missed five words on her test. . . . [D]efendant put his finger in her vagina . . . ." Finally, the unanimity instruction did not include this count, therefore, we must assume that the prosecutor made an election to consider this act of digital penetration as the one alleged in count seven.

[17] Defendant contends that one of these occurred outside the period alleged in the information, and, therefore, cannot serve as a basis for one of the counts.

that occurred before and after that date . . . . [The defendant] has a constitutional right to be sentenced under the terms of the laws in effect when he committed his offenses. For a court to hypothesize which acts the jury may have based its verdicts on . . . would amount to 'judicial impingement upon the traditional role of the jury.' [Citation.]" (*Id*. at pp. 256, 261, fns. omitted.)

While, as the People point out, there was uncontradicted evidence that defendant committed three lewd and lascivious acts on his stepdaughter after November 30, 1994, we cannot conclude, beyond a reasonable doubt, that the jury relied on these incidents in convicting defendant of three of the counts. Therefore, the matter must be remanded so defendant can be resentenced on counts one, two, three, four, five, six, and eight to the pre-November 30, 1994 prescribed punishment of three, six or eight years (section 288, subdivision (a)) and on count seven[18] to the term of three, six or eight years (section 289, subdivision (j)).

DISPOSITION

The sentence for counts one through eight are reversed and the matter is remanded for the trial court to resentence defendant on those counts to the terms provided by sections 288, subdivision (a) and 289, subdivision (j). The trial court is directed to amend the minutes for May 16, 2008 to show that priors one through eight, pursuant to both sections 667, subdivisions (b)-(i) and 667, subdivision (a)(1), were found true by the trial court and to add to the minutes the fact that allegations pursuant to sections 667.61,

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18 See footnote 16, *ante*, page 22.

subdivisions (a) & (d) and 667.71 were found true by the trial court as to counts one through six, eight and nine and an allegation pursuant to section 667.71 as to count 10. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P.J.

We concur:

McKINSTER
J.

RICHLI
J.